Unabomber

GOVERNMENT'S TRIAL BRIEF

Nov. 12, 1997

B. Admissibility of Testimonial Evidence

1. Expert Opinion

The government intends to call several witnesses who will provide expert testimony on matters of scientific or technical knowledge. These witnesses will include experts in the fields of explosives, materials analysis, toolmarks, chemical analysis, cryptanalysis, foreign language translation and questioned documents including typewriting comparison.

Where scientific or technical knowledge will help the jury understand certain evidence or determine a relevant fact, the government may elicit testimony from a qualified expert. Federal Rule of Evidence 702 provides:

> If scientific, technical or other specialized knowledge will assist a trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

When faced with a proffer of expert testimony the Court must first determine whether the expert witness is qualified and has specialized knowledge that will "assist a trier of fact to understand the evidence or to determine a fact in issue." Fed.R.Evid. 702. McKendall v. Crown Control Corp., 122 F.3d 803, 805 (9th Cir. 1997). Next, the Court must decide if the proposed subject matter of the expert opinion properly concerns "scientific, technical, or other specialized knowledge under Rule 702. Id. at 806. Finally, the Court must acsertain whether the testimony "rests on a reliable foundation and is relevant to the facts ofthe case." Id.

a. Foundation for Scientific Expert Opinion

In Daubert v. Merrell Dow Pharmaceuticals. Inc., 509 U.S. 579, 589-90 (1993) , the United States Supreme Court set forth the standard for evidentiary reliability of scientific expert testimony. (*11. Daubert applies only to the admission of "scientific" expert testimony. Daubert at 590 n.8 ("Our discussion is limited the scientific context because that is the nature of the expertise offered here."); McKendall v. Crown Control Corp., 122 F.3d 803, 806 (9th Cir. 1997) (declining to apply Daubert to testimony based on experience, not scientific knowledge) ; United States v. Cordoba, 104 F.3d 225, 230 (9th Cir. 1997) (declining to apply Daubert to testimony based on non-scientific specialized knowledge))*. The Court held that a proponent of scientific expert testimony must demonstrate that the theory or technique upon which the witness relies in forming his or her expert opinion or conclusion qualifies as "scientific knowledge." Id. "[I]n order to qualify as scientific knowledge, ' an inference or assertion must be derived by the scientific method. (*12. The Court defined scientific methodology as the process of formulating hypotheses and then proving, disproving or refining those hypotheses through testing. Daubert, 509 U.S. at 590.*) Proposed testimony must be supported by appropriate validation--i.e., 'good grounds,' based on what is known." Id. at 590.

A determination as to the admissibility of scientific expert testimony therefore requires "a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid...." Id. at 592-93. Theories that are so firmly established so as to be considered scientific law, such as the laws of thermodynamics, are properly subject to judicial notice. Id. at 593 n.11. For less established theories or methods, the Court declined to set out an exclusive test, noting that many factors bear on the inquiry. Id. at 593 ("The inquiry ... is, we emphasize, a flexible one") . Nevertheless, the Court suggested that, in assessing the validity of a scientific theory, federal judges should consider (1) whether it can be (and has been) tested, (2) whether it has been subjected to peer review and publication, (3) the known or potential rate of error, (4) the existence and maintenance of standards controlling the technique's operation, and (5) whether the technique is generally accepted in the relevant scientific community. Id. at 593-94. See United States v. Cordoba, 104 F.3d 225, 227-28 (9th Cir. 1997) (holding Daubert overruled per se rule excluding polygraph evidence); United States v. Hicks, 103 F.3d 837, 845-46 (9th Cir. 1996) (government's DNA evidence and expert testimony admissible under Daubert, where evidence introduced in order to show that none of three defendant's could be excluded as a perpetrator); United States v. Chischilly, 30 F.3d 1144, 1152-56 (9th Cir. 1994) (DNA evidence of match between defendant's blood sample and semen found on victim's clothing, and testimony regarding probability of coincidental match were admissible under Daubert); United States v. Amador-Galvan, 9 F.3d 1414, 1417-18 (9th Cir. 1993) (holding Daubert overruled per se rule excluding expert testimony regarding reliability of eyewitness identification) . The factors set forth in Daubert were not intended to be a definitive checklist or test but rather a guide for the trial court to determine whether testimony is scientifically valid. United States v. Cruz, ___ F.3d ___ 1997 WL 578418 (9th Cir. 1997). Accordingly, the government need not elicit testimony on each of the Daubert factors. Id.

The validation of scientific evidence thus requires more than authentication under Rule 901. Scientific evidence must also conform with the requirements of Rule 702. See Daubert, 509 U.S. at 588. The foundational elements for validation of scientific evidence are:

1. Witness is qualified to establish the theory's validity and the instruments reliability.
2. The underlying theory is valid; witness testifies about the empirical validation of the theory (proof of general acceptance is not required, but may be a relevant factor).
3. The instrument or technique is reliable (again, general acceptance is relevant, but not required).
4. Witness (not necessarily the same witness as for elements 1-3) is qualified to conduct and interpret the test results.
5. The instrument was in good working condition.
6. The witness used the instrument in the test.
7. The witness states the test results.

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IMWINKELRIED at 91-92.

The Ninth Circuit has held that questions as to whether or not the expert witness used proper test procedures do not affect admissibility. Rather, objections regarding potential mistakes in the testing processes go to the weight of the evidence. See Hicks, 103 F.3d at 846 (holding defendant's claim that polymerase chain reaction method of testing DNA sample was susceptible to contamination went only to the weight of the evidence and did not affect its admissibility) ; Chischilly, 30 F.3d at 1153 (holding defendant's challenge that other laboratories would have declared nonmatch when comparing defendant's DNA sample with evidentiary sample went to weight, rather than admissibility of FBI test results).

b. An Expert May Rely Upon Otherwise Inadmissible Evidence

Federal Rule of Evidence 703 states:

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

Under Rule 703, "an expert is permitted wide latitude to offer opinions, including those that are not based on first-hand knowledge or observation . . . [T]his relaxation of the usual requirement of first-hand knowledge . . . is premised on an assumption that the expert's opinion will have a reliable basis in the knowledge and experience of his discipline." Daubert, 509 U.S. at 592. In United States v. Williams, 447 F.2d 1285, 1290 (5th Cir.1971) , the Court explained the basis for the rule as follows:

> The rationale for this exception to the rule against hearsay is that the expert, because of his professional knowledge and ability, is competent to judge for himself the reliability of the

> records and statements on which he bases his expert opinion... An expert's opinion is derived not only from records and data, but from education and from a lifetime of experience. Thus, when the expert witness has consulted numerous sources, and uses that information, together with his own professional knowledge and experience, to arrive at his opinion, that opinion is regarded as evidence in its own right and not hearsay in disguise.

The Advisory Committee Notes give the following illustration:

> Thus a physician in his own practice bases his diagnosis on information from numerous sources and of considerable variety, including statements by patients and relatives, reports and opinions from nurses, technicians and other doctors, hospital records, and X rays. Most of them are admissible in evidence, but only with the expenditure of substantial time in producing and examining various authenticating witnesses. The physician makes life-and-death decisions in reliance upon them. His validation, expertly performed and subject to cross-examination, ought to suffice for judicial purposes.

Rule 703 thus permits an expert to testify about otherwise inadmissible evidence upon which he has relied in forming his opinion. Paddack v. Dave Christensen, Inc., 745 F.2d 1254, 1261-62 (9th Cir.1984); United States v. Abbas, 74 F.3d 506, 512 (4th Cir. 1996) (DEA chemist's conclusion that substance was heroin was admissible despite fact that it was based, in part, on known standards developed by other chemists); Minner v. Kirby, 30 F.3d 1353, 1360 (8th Cir. 1988) (Lab supervisor could testify from chemist's notes regarding results of "mechanically objective" drug test); Sherman v. Scott, 62 F.3d 136, 140 (5th Cir. 1995) (Same) United States v. Locascio, 6 F.3d 924, 938 (2d Cir. 1993) (FBI agent permitted to testify as an expert on the inner workings of the Gambino organized crime family despite the fact that testimony was based in part on hearsay).

When an expert is permitted to testify about inadmissible evidence used by him to support his opinion, it is appropriate for the court to instruct the jury that the otherwise inadmissible evidence is to be considered solely as a basis for the expert opinion and not as substantive evidence." Paddack v. Dave Christensen, Inc., 745 F.2d 1254 (9th Cir.1984)

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2. Cause of Death Testimony

In homicide cases, the prosecution must establish the cause of death and may generally do so through the coroner or other qualified expert who conducted the autopsy or examined the body. See Hughes v. Borg, 898 F.2d 695, 697 (9th Cir. 1989) (coroner who performed autopsy testified that murder victim died from bullet wound in head); United States v. Celestine, 510 F.2d 457, 459 (9th Cir. 1984) (coroner permitted to answer hypothetical question requesting his opinion as to likely result of defendant's alleged assault on victim, even though coroner was unsure of

cause of victim's death at time of autopsy); Medina v. United States, 254 F.2d 228, 230 (9th Cir. 1958) (coroner testified that victim died from stab wound) . See also State v. Schneider, 921 P.2d 759, 762-63 (Idaho Sup. Ct. 1996) (expert testimony that murder victim's death was probably caused by blows to head, but possibly could have been due to suffocation, was relevant and admissible); Kills On Top v. Montana, 928 P.2d 182, 197 (Mont. Sup. Ct. 1996) (pathologist who performed autopsy on murder victim expressed opinion that cause of death was a crushed skull caused by a stick or bat); In re Sixto, 774 P.2d 164, 167 (Cal. Sup. Ct. 1989) (in bank) (coroner testified that cause of victim's death was asphyxia as a result of manual strangulation); Arizona v. Girdler, 675 P.2d 1301, 1303 (Ariz. Sup. Ct. 1983) (in banc) (coroner testified as to condition of arson/murder victims' bodies and the cause of death).

With respect to graphic details, cause of death evidence should be limited only where its prejudicial effect substantially outweighs its probative value. Federal Rules of Evidence, Rule 403. See United States v. Goseyun, 789 F.2d 1386, 1387 (9th Cir. 1986) (holding district court did not err in admitting evidence of massive injuries relevant to cause of death); United States v. Lowrimore, 923 F.2d 590, 592 (8th Cir. 1990) (rejecting defendant's claim that autopsy report showing victim's cause of death resulted in prejudice which outweighed the evidence's probative value); United States v. Bowers, 660 F.2d 527, 529-30 (5th Cir. 1981) (holding district court did not abuse its discretion in admitting evidence relevant to cause of death, despite its potential to inflame jury). See also Montana v. Doll, 692 P.2d 473, 478 (Mont. Sup. Ct. 1985) (noting that in this era of modern media, it is quite difficult to show that the inflammatory nature of relevant evidence substantially outweighs its probative value).

Kaczynski is charged with four counts of transportation of an explosive with intent to kill or injure, in violation of 18 U.S.C. §§ 844(d) and 2(b), and three counts of mailing an explosive device with intent to kill or injure, in violation of 18 U.S.C. § 1716. The government thus has the burden of proving Kaczynski's intent to kill or injure for each of these seven counts. Testimony or other evidence showing the precise causes and circumstances of his victims' injuries or deaths is highly relevant to establishing this element.

The District of Columbia Circuit addressed this issue in United States v. Sampol, 636 F.2d 621 (D.C. Cir. 1980). In Sampol, seven defendants were charged with the first-degree murder of a foreign official. Id. at 629. The defendants used explosives to blow up a vehicle in which the Chilean ambassador to the United States and an American associate were passengers. Id. At trial, the government introduced the testimony of four eyewitnesses to the explosion, and the testimony of two medical examiners who performed autopsies on the victims' bodies. Id. at 679. The defendants objected to this testimony, arguing that the purpose of the government's evidence was merely to inflame the jury. Id. The District of Columbia Circuit held that the evidence was admissible. Id.

> To sustain the charge of murder in the first degree the government was required to prove that the killer or killers . . .acted with deliberation and premeditation. Proof of the

> precise nature of the explosion and its results was relevant to this issue. Although gruesome, this evidence demonstrated that whoever fashioned and placed the bomb in [the victim's] automobile had the deliberated and premeditated intent to kill him... Sampol, 636 F.2d at 679.

The Ninth Circuit has similarly held that cause of death evidence is admissible to show specific intent. See Guam v. Reyes, 879 F.2d 646, 649 (9th Cir. 1989) (holding chief medical examiner's testimony that bruise on decedent's chest was in close proximity to bullet's entry point and was probably caused by poking gun barrel against decedent was relevant to defendant's intent to kill); United States v. Goseyun, 789 F.2d 1386, 1387 (9th Cir. 1986) (holding photographic evidence of cause of death relevant to the willful, deliberate, and premeditated nature of the murder); United States v. Brady, 579 F.2d 1121, 1127 n.l (9th Cir. 1978) cert. denied, 439 U.S. 1074 ("[i]ntent may be proved by circumstantial evidence") Moreover, where it is relevant to establishing intent, state courts routinely admit cause of death evidence. See Arizona v. Anzivino, 716 P.2d 50, 54 (Ariz. Ct. App. 1985) (citing coroner's determination as to cause of victim's death as factor supporting trial court's finding of malicious intent by appellant); Commonwealth v. Miller, 634 A.2d 614, 618 (Penn. Super. Ct. 1993) (holding coroner's conclusion that stab wound through the heart caused victim's death gave rise to an inference of malice); Louisiana v. Pettle, 286 So.2d 625, 631 (La. Sup. Ct. 1973) (holding that coroner's opinion as to cause of victim's death was relevant to the issue of defendant's intent). In fact, in some cases, cause of death evidence may be necessary for a finding of intent to kill. See California v. Hamilton, 710 P.2d 981, 995-96 (Cal. Sup. Ct. 1985) (holding that since precise cause of death not determined, court did not have enough evidence to conclude that intent to kill was established as a matter of law).

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3. Use of Summary Witness

Due to the voluminous nature of the documentary evidence seized from the cabin, the government intends to call an FBI agent to summarize the contents of these documents and to read to the jury selected passages. The government contemplates that each of the documents in issue will have been previDusly admitted into evidence before the agent takes the stand.

Federal Rule of Evidence 1006 provides that "the contents of voluminous writings, recordings or photographs which cannot be conveniently examined in court may be presented in the form of a chart, summary or calculation". The Ninth Circuit has recognized that summary evidence "can help the jury organize and evaluate evidence which is factually complex and fragmentally revealed in the testimony of the multitude of witnesses." United States v. Shirley, 884 F.2d 1130, 1133 (9th Cir. 1989), quoting United States v. Lemire, 720 F.2d 1327, 1348 (D.C. Cir. 1983); see also United States v. Meyers, 847 F.2d 1408, 1412 (9th Cir. 1988) (Approving the use of a summary witness where the sequence of events was confusing and the chart contributed to the clarity of presentation).

Although the underlying materials upon which the summary testimony is

based must be "admissible", they need not be actually admitted into evidence. United States v. Meyers, 847 F.2d at 1412 The foundation for admission of such a summary is simply that the records are voluminous and that in-court examination would be inconvenient. United States v. Duncan, 919 F.2d 981, 988 (5th Cir. 1990) , cert. denied 500 U.S. 926 (1991). In Duncan, several individuals who were charged with defrauding insurance companies over a period of years by staging accidents and submitting numerous false claims. At trial, an FBI agent summarized the voluminous insurance company records pertaining to claims submitted by the defendants. The Court ruled that the agent's testimony, and accompanying summary charts, were properly admitted under Rule 1006. Id. at 988.

Similarly, in United States v. Osum, 943 F.2d 1394, 1405 (5th Cir. 1991), the defendant was charged with conspiring to commit mail fraud in a scheme involving fraudulent accident claims while he was employed as a bus driver for the New Orleans Regional Transit Authority. At trial, a government witness "synthesized various documentary information from the three accidents" including bus company files, drivers' reports, supervisors' reports, claim adjustors' reports, and medical reports. The Court held that admission of the testimony of such a summary witness was well within the trial court's discretion under FRE 1006. See also Goldberg v. United States, 789 F.2d 1341, 1343 (9th Cir. 1986) (Summary testimony of IRS agent concerning voluminous records admissible).

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